Public Prosecutor v Amrul Lubis

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45–60 OF 2004
JEFFREY TAN J
13 AUGUST 2008

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(da) — Trafficking in methamphetamine — Allegation of — Physical nexus between accused and drugs found — Whether presumption of trafficking proved against accused — Dangerous Drugs Act 1952 s 37(da)

Criminal Procedure — Trial — Close of prosecution's case — Prima facie case — Evidence — Physical nexus between accused and drugs found — Whether arose — Whether element of possession proved — Whether drugs recovered without presence of accused admissible — Whether there was discrepancy as to weight of drugs — Whether prima facie case made out against accused — Criminal Procedure Code s 180(1)

The accused, who was on his way to board a ferry to Batam, Indonesia, was searched at the customs check point, and in the search that followed, two packets of dangerous drugs were recovered in the presence of the accused while a third packet of the same dangerous drug was recovered in the absence of the accused from a wooden cabinet. SP2, the customs officer, who was on duty at the customs check point at the material time, was the only prosecution witness who could give a complete account of the recovery of all three packets of drugs. According to SP2, he noticed a suspicious bulge in the trouser zip area of the accused. For further examination, SP2 had escorted the accused to the customs examination room that was immediately in front of the counter where he had examined the bag of the accused. In the examination room, SP2 ordered the accused to stand in front of the table, empty his pockets and to place its contents on that table. The accused complied and stood in front of the table. Thereafter, SP2 walked out of the room and closed the door. Whilst in front of the door, SP2 heard banging sounds from the wooden cabinet in the examination room. SP2 opened the door straightaway. According to SP2, the accused had changed his position from the front of the table and was in front of the wooden cabinet; and that from where he stood at the door, he saw two black packages on the floor beneath the table. The accused however, denied all knowledge of those packets. Inside the wooden cabinet, SP2 and SP6 uncovered a third black

packet, on top of a pile of newspapers. The accused was not present when SP2 and SP6 uncovered the third packet. All the three packets were black in colour and embossed 'Kolok'. The prosecution case herein was thus, built entirely on circumstantial evidence.

Held, acquitting and discharging the accused:

(1) The third packet was recovered without the accused being present to witness the alleged recovery from the wooden cabinet. The importance of an accused being present to witness the recovery of proscribed drugs is this, that an accused who is not present during the recovery of the proscribed drugs would be effectively denied the chance to challenge the very evidence upon which his fate hangs, and would be thus seriously handicapped in the conduct of his defence. That could not be fair. Further, if proscribed drugs, albeit recovered without the presence of an accused, could be admitted in evidence then there could be no safeguard against the possibility of proscribed drugs being planted after the arrest. That would throw open the possibility of unjust convictions. The greater issue was the safeguard or some safeguard against false evidence, which would be breached if the third packet were allowed to incriminate the accused. Simply put, the third packet could not be in the equation (see para 12).

(2) If the accused were to be called to enter upon his defence, the weight of the proscribed drugs must be stated in the amended charge. However, the weight could not be ascertained from the evidence. It was granted that the weight of those two packets must be the combined weight of two of those three packets, in any combination of two, would exceed the minimum tariff attracting the presumption under s 37(da). But that deduction would still leave unresolved the precise weight of those two packets. The weight of the proscribed drugs, just could not be stated in the (amended) charge (see para 13).

(3) Further, there was no way of knowing which two packets, X1, X2, and or X3, should be the proscribed drugs and the incriminating evidence, in the event that the accused were to be called to enter upon his defence. In the face of those uncertainties, and bearing in mind that it was the duty of the prosecution to prove each and every ingredient of the offence, it surely would not seem just or right to call the accused to enter upon his defence (see para 13).

[Bahasa Malaysia summary

Tertuduh, yang sedang dalam perjalanan untuk menaiki feri ke Batam, Indonesia, telah diperiksa di tempat pemeriksaan kastam dan semasa

A pemeriksaan dijalankan, dua paket dadah berbahaya telah ditemui semasa kehadiran tertuduh sementara paket ketiga dari dadah berbahaya yang sama telah ditemui di kabinet kayu tanpa kehadiran tertuduh. SP2, seorang pegawai kastam yang bertugas di tempat pemeriksaan pada masa yang material, adalah satu-satunya saksi pihak pendakwaan yang boleh
B memberikan cerita yang lengkap mengenai penemuan ketiga-tiga paket dadah tersebut. Menurut SP2, dia menyedari satu benjolan yang menimbulkan kesangsian pada bahagian zip seluar tertuduh. Untuk pemeriksaan lanjut, SP2 telah mengiringi tertuduh ke bilik pemeriksaan kastam yang terletak betul-betul di hadapan kaunter di mana dia memeriksa
C beg tertuduh. Di dalam bilik pemeriksaan, SP2 telah mengarahkan tertuduh untuk berdiri di hadapan meja, mengosongkan poketnya dan meletakkan kandungannya di atas meja tersebut. Tertuduh mematuhinya dan berdiri di hadapan meja. Selepas itu, SP2 telah berjalan keluar daripada bilik dan menutup pintu. Semasa di hadapan pintu, SP2 telah mendengar bunyi
D dentuman daripada kabinet kayu di dalam bilik pemeriksaan. SP2 telah membuka pintu dengan segera. Menurut SP2, tertuduh telah beralih kedudukan dari hadapan meja dan berada di hadapan kabinet kayu; dan dari pintu tempat dia berdiri, dia melihat dua paket di atas lantai di bawah meja. Walau bagaimanapun, tertuduh menafikan sepenuhnya pengetahuan
E terhadap paket-paket tersebut. Di dalam kabinet kayu, SP2 dan SP6 menemui satu paket hitam yang ketiga, di atas timbunan surat khabar. Ketiga-tiga paket berwarna hitam dan dicetak timbul dengan perkataan 'Kolok'. Kes pihak pendakwaan di sini adalah, keseluruhannya dibina di atas keterangan mengikut keadaan.

F

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Paket ketiga telah dijumpai tanpa kehadiran tertuduh untuk
G menyaksikan penemuan yang didakwa daripada kabinet kayu tersebut. Pentingnya tertuduh untuk hadir menyaksikan penemuan dadah yang diharamkan adalah, seseorang tertuduh yang tidak hadir semasa penemuan dadah yang diharamkan boleh secara efektif dinafikan peluang untuk mencabar setiap keterangan yang menentukan nasibnya
H dan oleh itu secara serius dihalang dalam tindakan pembelaannya. Itu adalah tidak adil. Selanjutnya, jika dadah yang diharamkan yang ditemui tanpa kehadiran tertuduh boleh dimasukkan di dalam keterangan dengan itu tidak terdapat pelindung terhadap kemungkinan dadah yang diharamkan diletakkan selepas tangkapan. Ini akan
I membuka kemungkinan sabitan yang tidak adil. Isu paling besar adalah pelindung atau sesuatu pelindung terhadap keterangan palsu, yang mungkin dilanggar jika paket ketiga dibenarkan untuk menunjukkan tertuduh bersalah. Secara ringkas, paket ketiga tidak boleh diberikan persamaan (lihat perenggan 12).

(2) Jika tertuduh dipanggil untuk memasukkan pembelaannya, berat dadah yang diharamkan mestilah dinyatakan di dalam pertuduhan terpinda. Tetapi berat tersebut tidak dapat dipastikan daripada keterangan. Yang diberikan adalah berat dua paket yang semestinya gabungan berat dua daripada tiga paket, di dalam mana-mana kombinasi keduanya, akan melebihi minimum takrif yang menarik anggapan di bawah s 37(da). tetapi kesimpulan tersebut membiarkan berat yang tepat kedua-dua paket tidak diselesaikan. Berat dadah yang diharamkan, hanya tidak dinyatakan di dalam pertuduhan (terpinda) (lihat perenggan 13).

(3) Selanjutnya, tiada cara untuk mengetahui dua paket yang mana sama ada, X1, X2 dan/atau X3, adalah dadah yang diharamkan dan keterangan yang menunjukkannya bersalah, jika tertuduh dipanggil untuk memasukkan pembelaannya. Di dalam keadaan ketidak tentuan tersebut, dan perlu diingat bahawa ianya adalah tugas pihak pendakwaan untuk membuktikan setiap faktor kesalahan, adalah pasti tidak kelihatan adil atau betul untuk memanggil tertuduh untuk memasukkan pembelaannya (lihat perenggan 13).]

Notes

For cases on close of prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

For cases on s 39 of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 251–252.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137; [1992] 1 CLJ 39, SC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105, CA (refd)

Legislation referred to

Criminal Procedure Code s 180(1), (4)
Dangerous Drug Act 1952 s 37(da)

Amirah bt Mohd Yusoff (Deputy Public Prosecutor, Legal Unit, Royal Malaysian Customs) for the prosecution.
Navamani Arumugam (Navamani & Co) for the accused.

Jeffrey Tan J:

[1] The accused was tried for the following capital offence.

A Bahawa kamu pada 16.9.2003 lebih kurang jam 12.30 tengahari di laluan keluar Terminal Jeti Stulang Laut, dalam Negeri Johor Darul Ta'zim, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 208.14 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

B

[2] 11 witnesses were summoned by the prosecution to prove the charge. It was the prosecution's story that the accused, who was on his way to board the ferry to Batam, Indonesia, was searched at the customs check point, and that in the search that followed, two packets of the said dangerous drug were C recovered in the presence of the accused while a third packet of the same said dangerous drug was recovered in the absence of the accused. But it was not proved which two packets were allegedly recovered in the presence of the accused, and which one packet was allegedly recovered in the absence of the D accused.

[3] The only prosecution witness who could give a complete account on the recovery of all three packets of drugs was SP2 (Mohd Fazli bin Mohamad), the customs officer on duty at the customs check point at the E Stulang Duty Free Complex, Johor Bahru at the material time. The collective story of SP2 and other witnesses from the Royal Malaysian Customs could be summarised as follows.

[4] At 12.30pm on 16 September 2003, the accused was at the customs F check point at the Stulang Duty Free Complex, Johor Bahru. The accused was on his way to board the ferry to Batam, Indonesia. Slung on the shoulder of the accused was a green canvass bag (P5). SP2 examined and found that bag to contain clothing, a telephone charger, a lighter and some loose change (RM14.20). SP2 noticed a suspicious bulge on the trousers zip area of the G accused. Using his fingers, SP2 felt that there was something concealed underneath. According to SP2, 'Saya rasa OKT rasa terkejut dan gelisah'. SP2 escorted the accused to the customs examination room (examination room) that was immediately in front of the counter where he had examined the bag of the accused, for further examination. In the examination room, SP2 H ordered the accused to stand in front of the table, to empty his pockets and to place its contents on that table. The accused complied and stood in front of the table. Thereafter, SP2 walked out of the room and closed the door. Whilst in front of the door, SP2 heard banging sounds from the wooden cabinet in the examination room. SP2 straightaway opened the door. I According to SP2, the accused had changed his position from being in front of the table to being in front of the wooden cabinet, and that from where he stood at the door he saw two black packages on the floor beneath the table. SP2 asked the accused, as to what he had done. The accused remained silent. According to SP2, those two black packets were not there when he ordered

the accused to empty his pockets. SP2 asked a crew of the ferry to summon a traveller control officer. About two minutes later, a Traveller Control Officer, Saadon Mohd Nor, arrived at the scene. SP2 briefed Saadon (Saadon passed away on 18 July 2006 — see p 15 of the notes of proceedings). SP2 and Saadon then entered the examination room. Saadon enquired about those two packets from the accused. The accused denied all knowledge of those packets. Saadon directed the accused to pick up those two black packets beneath the table. The accused complied. Saadon then arrested the accused. SP2 and Saadon escorted the accused with the two black packets in his handcuffed hands, to the travellers control room, after SP2 had first locked up the examination room. Those two black packets were embossed 'Kolok'. At the travellers control room, SP2 contacted SP6 (Mohd Roslan bin Mokhtar — a senior customs officer). Meantime, the accused was detained in the travellers control room, with the two black packets placed on a table. About 10 minutes later, SP6 and SP4 (Masron bin Sahari — a senior customs officer) arrived at the travellers control room. SP2 briefed SP6. SP2 then remembered the sounds he heard from the wooden cabinet. SP2 and SP6 proceeded to the examination room, to search the wooden cabinet. Inside the wooden cabinet, SP2 and SP6 uncovered a third black packet, also embossed 'Kolok', on top of a pile of newspapers. The accused was not present when SP2 and SP6 uncovered that third packet (see p 18 of the notes of proceedings). SP6 instructed SP2 to bring that third packet to the travellers control room. About five or six minutes after they had left, SP2 and SP6 were back at the travellers control room, with the third black packet and the topmost sheet from the said pile of newspapers. At the travellers control room, SP2 placed that third black packet next to the other two packets on the table. According to SP2, all three packets were black in colour and embossed 'Kolok', and according to SP6, all three black packets 'adalah serupa'. The customs officers present then stood guard over the accused, while they waited for the arrival of the Customs Drugs Unit. At 3pm, SP9 (Hafiz bin Haris), the head of the customs drugs unit, arrived at the travellers control room, whereat SP6 handed the accused, said three packets, and canvass bag to SP9. Later, at the customs office, SP9 handed the accused and all exhibits to the investigation officer (SP10 — Khairulanuar bin Ishak).

[5] Up to that point, there was yet no evidence that any one witness had marked the exhibits. Indeed, it was the testimony of both SP9 (see pp 44–45 of the notes of proceedings) and SP10 (see pp 50–52) that the exhibits were only marked after they had been handed to SP10. As a matter of fact, the effect of the testimony of SP10 was that all exhibits were bereft of all markings when he received them. Pertinently, SP10 even revealed that the myriad markings on the drug exhibits were not made by either SP2 and or SP6 who had allegedly recovered them.

A **[6]** The full testimony of SP10 was as follows. At 3.25pm on 16 September 2003, at the Johor Bahru Customs Investigation Office, he met SP9 who handed to him the accused and his passport, a green canvass bag, and three black packets embossed 'Kolok'. Two customs officers (SP5 and Seng Yean a/l Tian) examined the canvass bag and recorded its contents. He affixed a B (rectangular piece of) masking tape onto the carbon paper of each packet. Then, on his instruction, SP2, SP5 and SP9 affixed their signatures on that masking tape on the carbon paper of the first packet. He removed the carbon paper of that packet and uncovered a clear plastic packet containing a powdery substance. He made the markings ('X1', investigation number, and C date 16 September 2003) on the first clear plastic packet. SP2 and SP9 also affixed their signatures onto that clear plastic packet. He weighed and found that the gross weight of 'X1' was 101.8g. He repeated that same process to the second and third black packets. He, SP2 and SP9 put their signatures on the masking tape on the carbon paper of the second packet. He removed that D carbon paper of that second black packet and found a red plastic bag containing a package wrapped in tissue paper. He affixed a masking tape onto that tissue paper. He and SP9 put their signatures on both the red plastic bag and masking tape on that tissue paper. He removed that red plastic bag and E tissue paper, and found a clear plastic packet containing a powdery substance. He made the markings ('X2', investigation number, and date 16 September 2003) on that second clear plastic packet. He, SP2 and SP9 put their signatures on that second clear plastic packet. He weighed and found that the gross weight of 'X2' was 107.5g. He, SP2 and SP9 put their signatures on the F masking tape on the carbon paper of the third packet. He removed that carbon paper of that third black packet and found a red plastic bag which he also removed and then found a clear plastic packet containing a powdery substance. He made the markings ('X3', investigation number, and date 16 September 2003) on the third clear plastic packet. He and SP9 put their G signatures on that third clear plastic packet. He weighed and found that the gross weight of 'X3' was 104.7g. That was all done in the presence of the accused. At 12.30 on 17 September 2003, he handed the drug exhibits to a government chemist (SP3 — Shadiah bt Mohammad) for analysis.

H **[7]** It was the unchallenged testimony of the said government chemist that the packet marked 'X1' contained 66.48g of methamphetamine, that the packet marked 'X2' contained 69.54g of methamphetamine, and that the packet marked 'X3' contained 72.12g of methamphetamine.

I **[8]** At the close of the prosecution's case, Miss Navamani Arumugam for the accused submitted that there was no conclusive proof to link the accused to the drugs. Learned counsel also submitted as follows. At the point when he was brought to examination room, there was no evidence that the accused had drugs. SP2 left the examination room without seeing the accused

emptying his pockets. It was not proved that the packets came from the accused. The third packet was recovered in the absence of the accused. How sure were SP2 and or SP6 that the examination room was empty? The drugs could have been there all along. The best inference must be given to an accused (counsel cited *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105). None of the witnesses could say which packets were recovered from the floor beneath the table or which packet was recovered from the wooden cabinet. Since physical possession was not proved, there could not be any question of trafficking. As the third packet was not recovered in the presence of the accused, defence could not be called for all three packets. As it was not proved which two were those packets, defence could not be called for the two packets on the floor. There was no evidence that the trousers zip area of the accused was flat after his arrest. There was no evidence of trafficking. The accused was leaving Malaysia, and trafficking could not have been the intention. In the trial of a capital offence, mere suspicion is not enough (counsel cited *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423).

[9] The learned DPP, Puan Amirah bt Mohd Yusoff, readily conceded that there was no evidence as to which two packets were those on the floor and which packet was that from the wooden cabinet. The learned DPP nevertheless contended that all three packets must have come from the accused. The learned DPP pointed to the evidence that the accused was 'terkejut dan gelisah' when SP2 examined the suspicious bulge, that save for a table, three chairs, wooden and steel cabinets, the examination was empty, and that the packets were not there before the accused was brought into the examination room. 'They could not have dropped from the sky'. The learned DPP also contended that the similarity in appearance, weight, size, and wrappings of all three packets was no coincidence. Then citing *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306, at p 307, the learned DPP submitted that 'there could only be the one inference, that all three packets came from the accused. Section 37(da) should be invoked. The learned DPP added that there was direct evidence of trafficking even if s 37(da) were not invoked.

[10] Section 180(1) of the Criminal Procedure Code ('Code') provides that:

> ... when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

[11] Given that the alleged offence was committed in 2003, the definition of a prima facie case in s 180(4) of the Code which came into effect on 7 September 2007 'cannot apply retrospectively' (*Public Prosecutor v Hanif*

Basree bin Abdul Rahman [2008] 3 MLJ 161 per Zaki Azmi PCA) in the instant case. Rather, the definition to apply was that judicially pronounced in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321, where it was held by the Federal Court per Augustine Paul JCA, as he then was, that a prima facie case is one that it is sufficient for the accused to be called upon to answer where the evidence adduced is such that if unrebutted is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen, that a prima facie case has not been made out where there is no material evidence which can be believed in the latter sense, that the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established, that the test at the close of the prosecution case is whether the evidence is sufficient to convict the accused if he elects to remain silent, and that an accused who elects to remain silent must be convicted.

[12] The first thing that could be said about the prosecution's case is that it was built entirely on circumstantial evidence, which was that when first examined the accused had a suspicious bulge on the front of his trousers, that SP2 felt something concealed below the front waistline of the accused, that the examination room, save for some basic furniture, was devoid of all articles or objects before the accused was brought into that room, and that the three packets of proscribed drugs surfaced in the examination room only after the accused had been into that room. Further circumstantial evidence that augmented the prosecution case was the reaction ('terkejut dan gelisah') of the accused when SP2 felt the suspicious bugle with his fingers, the banging sounds from the wooden cabinet when the accused was all alone in the examination room, and the fact that the accused had changed his position, from being in front of the table to being in front of the wooden cabinet. Put together, the picture that the prosecution painted was that the accused had hastily relieved himself of the packets when SP2 was conveniently out of the examination room, by throwing two packets beneath the table and one packet into the wooden cabinet. If that were so, then that should account for the change in the position of the accused and the banging sounds heard from the wooden cabinet, as the accused would have to be close to the wooden cabinet and might even have to open it, to throw a packet into the wooden cabinet. All told, it would seem that there was sufficient evidence, albeit circumstantial, for a reasonable deduction that the accused must have had those three packets with him when he was brought into the examination room. In other words, the accused must have had possession of the three packets of proscribed drugs when he was brought into the examination room. If that were so, then the prosecution should be entitled to the benefit of s 37(da) (see *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3

MLJ 193). For all three packets of proscribed drugs, it should seem that there was a prima facie case at first blush. But to find so would overlook the fact that the third packet was recovered without the accused being present to witness the alleged recovery from the wooden cabinet. The importance of an accused being present to witness the recovery of proscribed drugs is this, that an accused who is not present during the recovery of the proscribed drugs would be effectively denied the chance to challenge the very evidence upon which his fate hangs, and would be thus seriously handicapped in the conduct of his defence. That could not be fair. More disturbing is this, that if proscribed drugs, albeit recovered without the presence of an accused, could be admitted in evidence, then there could be no safeguard against the possibility of proscribed drugs being planted after the arrest (for an analogy, see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ 39). That would throw open the possibility of unjust convictions. Nope, the greater issue is the safeguard or some safeguard against false evidence, which would be breached if the third packet were allowed to incriminate the accused. Simply put, the third packet could not be in the equation.

[13] Even so, there remained yet a prima facie case for the remaining two packets, which begs the question, which two packets. That was not answered by the evidence, as SP2 and or SP6 had not made any individual marks on any one of the three packets, or identified the packets there were recovered from the floor and or from the wooden cabinet. And that presented a most serious problem. The weight of the proscribed drugs must be stated in the amended charge, if the accused were to be called to enter upon his defence. But that weight could not be ascertained from the evidence. It is granted that the weight of those two packets must be the combined weight of two of those three packets, in any combination of two, would exceed the minimum tariff attracting the presumption under s 37(da). But that deduction would still leave unresolved the precise weight of those two packets. The weight of the proscribed drugs, just could not be stated in the (amended) charge. On top of that, there was yet the more crucial but unresolved issue of the identity of those two packets recovered from the floor. There was no way of knowing which two packets, X1, X2, and or X3, should be the proscribed drugs and the incriminating evidence, in the event that the accused were to be called to enter upon his defence. In the face of those uncertainties, and bearing in mind that it is the duty of the prosecution to prove each and every ingredient of the offence, it surely would not seem just or right to call the accused to enter upon his defence. In a cleft stick, there was really no other alternative but to acquit and discharge the accused.

Accused acquitted and discharged.

Reported by Ashgar Ali Ali Mohamed